

# **EXHIBIT 2**

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT  
NO. 13-1089

KIMBERLEE WILLIAMS, etc. et al.,  
Appellants

v.

BASF CATALYSTS LLC; et al.

Transcript from the audio recording of the oral argument held Thursday, March 13, 2014 at the United States Courthouse, 601 Market Street, Philadelphia, Pennsylvania. This transcript was produced by James DeCrescenzo, a Fellow of the Academy of Professional Reporters, a Registered Diplomate Reporter, an Approved Reporter of the United States District Court.

BEFORE:

THE HONORABLE THEODORE A. MCKEE

THE HONORABLE THOMAS L. AMBRO

THE HONORABLE JULIO M. FUENTES

THIRD CIRCUIT, 3/13/2014

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THIRD CIRCUIT, 3/13/2014

1                   The question is is there a line? And  
2 I think the answer is there is. The line would be  
3 is it okay to take evidence and destroy it? To  
4 talk about it --

5                   THE COURT: Well that's different.  
6 We're talking about fraud and you're talking about  
7 spoliation.

8                   MR. POLLOCK: Well, the question here  
9 was fraud upon -- was the litigation privilege, how  
10 broad is the litigation privilege. The litigation  
11 privilege may, it may address the individual  
12 representation by an individual, but does it really  
13 go so far as to say if I collect evidence as part  
14 of a plan, a conspiracy, because now you've got New  
15 Jersey RICO triggered. Let's assume for the sake  
16 of argument it is. That it is inappropriate for a  
17 lawyer and a company to conspire to collect  
18 evidence, destroy it and deceive the court.

19                  You've got RICO, which is a remedial  
20 statute, incredibly broad, and you've got the  
21 litigation privilege saying an individual  
22 representation, even if it's potentially wrong or  
23 false, a few bad apples, as Judge Albin in essence  
24 says, gets away. Those two issues are in conflict.

THIRD CIRCUIT, 3/13/2014

1                   There has got to be a line where the  
2 conduct, for example, of collecting that evidence  
3 and conspiring about it, because otherwise it will  
4 be open season on the courts. What people would  
5 say, and Atlas clearly points out, there is some  
6 point where the equitable power of this court to  
7 stop fraud does step in.

8                   And so to me the question that's right  
9 here is that that individual statement perhaps, and  
10 so to use our example, let's assume BASF --

11                  THE COURT: Why can't the lawyers  
12 say there is no asbestos in our talc product in  
13 the course of litigation, in the course of  
14 discovery, and why can't he say that? And if he  
15 says it why isn't he entitled to the litigation  
16 privilege because they are words uttered in the  
17 course of litigation?

18                  MR. POLLOCK: I think to put a fine  
19 point on it --

20                  THE COURT: It's separate from the  
21 spoliation issue that you were discussing before.

22                  MR. POLLOCK: I think they're  
23 intertwined and here's how I think they're  
24 intertwined.

THIRD CIRCUIT, 3/13/2014

1                   If BASF and Cahill Gordon have a  
2 case in Wichita, Kansas and they have a guy, they  
3 hire local counsel and they say John, there's no  
4 asbestos in our talc, file a motion to dismiss.  
5 John walks in and files a motion to dismiss.

6                   I agree with you he is absolutely  
7 immune under the litigation privilege. Whether  
8 that statement is false or not, he is protected  
9 because he believes it to be true, et cetera.

10                  THE COURT: Well, that's the key.  
11 You're putting a rabbit in the hat with this  
12 hypothetical. The issue here is -- because that's  
13 not even fraud because there's no scienter.

14                  MR. POLLOCK: Exactly right. So now,  
15 and Judge, Chief Judge McKee, what I was going to  
16 is then take the next step. Is it a difference  
17 that makes a difference if Cahill Gordon walks in,  
18 knowing that it was false, because now you've got  
19 the action of conspiracy and you've got the  
20 statement. Is that a difference that makes a  
21 difference?

22                  The litigation privilege under Loigman  
23 says hey, as to that individual representation  
24 maybe it's not a problem, I can go ahead and lie

THIRD CIRCUIT, 3/13/2014

1 CERTIFICATION  
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I, JAMES DeCRESCENZO, a Registered  
Diplomate Reporter, Certified Realtime Reporter,  
Certified Shorthand Reporter of New Jersey, License  
Number XI 00807, and Notary Public, hereby certify  
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I further certify that I am neither  
attorney nor counsel for, not related to nor  
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further, that I am not a relative or employee of  
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nor am I financially interested in this case.

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